STATE OF WISCONSIN COURT OF APPEALS

DISTRICT II

STEVEN T. KILIAN,

Plaintiff-Appellant-Cross-Respondent,

Appeal No. 2009AP000538
(Waukesha County Circuit Court
Case No. 07-CV-1869)

v.

MERCEDES-BENZ USA, LLC, and
DAIMLERCHRYSLER FINANCIAL
SERVICES AMERICAS, LLC,
d/b/a Mercedes-Benz Financial,

Defendants-Respondents-Cross-Appellants.

BRIEF OF APPELLANT, STEVEN T. KILIAN

ON APPEAL FROM CIRCUIT COURT FOR WAUKESHA COUNTY
THE HONORABLE RALPH M. RAMIREZ PRESIDING

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Answered by the Trial Court: No.

II. Can a consumer seek purely equitable relief under sec. 218.0171(7), Wis. Stats., for a violation of sec. 218.0171(2)(cm)3., Wis. Stats., thereby justifying an attorney fee award?

Answered by the Trial Court: No.

III. Do pre-suit attorney fees and costs qualify as a pecuniary loss under sec. 218.0171(7), Wis. Stats. for a violation of sec. 218.0171(2)(cm)3., Wis. Stats.?

Answered by the Trial Court: No.

IV. If a motor vehicle lessor employs economic defamation in its attempts to enforce a lease, are the defamation damages suffered by the lessee a pecuniary loss under sec. 218.0171(7), Wis. Stats.?

Answered by the Trial Court: No.

V. If a motor vehicle lessor employs economic defamation in its attempt to enforce a lease, are the inconvenience damages suffered by the lessee a pecuniary loss under sec. 218.0171(7), Wis. Stats.?

Answered by the Trial Court: No.

STATEMENT ON ORAL ARGUMENT

Oral argument on the issues presented would be beneficial to allow the parties to develop the issues and arguments more fully than if limited to the briefs of the parties.

STATEMENT ON PUBLICATION

Publication of the decision in accordance with sec. 809.23, Wis. Stats., is warranted as this case involves issues not yet discussed in any reported decision and will clarify existing law.

STATEMENT OF THE CASE

On July 10, 2007, the Appellant-Cross-Respondent, Steven Kilian, commenced this action against Mercedes-Benz USA, LLC (hereinafter "Mercedes") for violation of sec. 218.0171(2)(b), Wis. Stats. and DaimlerChrysler Financial Services Americas, LLC, d/b/a Mercedes-Benz Financial (hereinafter "Mercedes Financial"), for violation of sec. 218.0171(2)(cm), Wis. Stats. (R. 1.)

On March 21, 2008, Mercedes filed a Motion to Dismiss and Motion for Summary Judgment. (R. 26-28, R. 30, R. 33.) Mercedes Financial also filed a Motion to Dismiss and a Motion for Summary Judgment on March 21, 2008. (R. 24-25, R. 29, R. 31-32, 33.) Mr. Kilian filed a Motion for Summary Judgment on March 24, 2008. (R. 38-41.)

On May 23, 2008, the trial court issued a written decision denying the parties respective motions, without conducting a hearing. (R. 57.) There was a judicial transfer due to judicial rotation on August 4, 2008.

The trial court conducted a pretrial conference on August 6, 2008. The parties agreed that further motion proceedings were appropriate as there were no material facts in dispute. On September 12, 2008, Mr. Kilian filed a Supplemental Motion for Summary Judgment. (R. 60-62.) On September 15, 2008, Mercedes and Mercedes Financial filed a joint Motion for Reconsideration. (R. 63.)

A hearing was held on October 7, 2008. The trial court denied Mr. Kilian's motion, denied the Motion for Reconsideration as to Mercedes Financial, and granted the Motion for Reconsideration as to Mercedes. (R. 93; App. 110-172.) An order was entered on December 15, 2008. (R. 77; App. 173-174.)

On December 8, 2008, Mercedes Financial filed a Motion to Strike Claim for Damages, along with a Motion for Costs and Attorneys' Fees on behalf of both Mercedes Financial and Mercedes. (R. 72-74.) A hearing was held on January 16, 2009. The trial court granted the Motion to Strike Claim for Damages but denied the Motion for Costs and Attorneys' Fees. (R. 94; App. 175-216.) A judgment was entered on February 6, 2009. (R. 88-89; App. 217-219.)

STATEMENT OF THE FACTS

On March 21, 2006, Mr. Kilian leased a 2007 Mercedes-Benz S550V LWB from Concours Motors, Inc. He entered into a thirty-nine month lease agreement with Mercedes Financial at the rate of $1,826.12 per month. (R. 39: 4-6; App. 101, 104-106.)

After taking delivery of the vehicle, Mr. Kilian experienced numerous problems, which prompted him to seek relief under the Wisconsin Lemon Law.

On April 11, 2007, Mr. Kilian sent Mercedes a Motor Vehicle Lemon Law Notice offering to return his vehicle in exchange for a refund calculated in accordance with the Wisconsin Lemon Law. (R. 38: 4-8.) Mercedes received the notice on April 16, 2007. (R. 38: 9.) On May 1, 2007, Mercedes agreed to provide Mr. Kilian with a refund calculated in accordance with the Wisconsin Lemon Law pursuant to sec. 218.0171(2)(b)3.a., Wis. Stats. (R. 38: 9-10.)

On May 7, 2007, Mr. Kilian notified Mercedes that he was willing to accept the sum Mercedes offered to him as a refund of the amount he paid under the written lease. (R. 38: 11.) On May 10, 2007, Mr. Kilian returned the subject vehicle to Mercedes at Concours Motors, Inc. (R. 39: 1; App. 101.) Mr. Kilian received a check in the sum of $20,847.87 from Mercedes. (R. 39: 2, 7; App. 102, 107.)

Subsequent to Mr. Kilian's return of the vehicle to Mercedes, he began receiving telephone calls, including daily telephone calls for a period of time, from representatives of Mercedes Financial demanding payment under the Motor Vehicle Lease Agreement. (R. 39: 2; App. 102.) On several occasions, Mr. Kilian explained very clearly to the representatives of Mercedes Financial that he returned the vehicle under the Lemon Law. (R. 39: 2; App. 102; R. 40: 26.) On one occasion, the Mercedes Financial representative responded to Mr. Kilian that the return of the vehicle under the Lemon Law was between him and the dealership and that he had a financial obligation to Mercedes Financial. (R. 39: 2; App. 102.)

Mr. Kilian made numerous attempts to resolve this matter short of litigation. Mr. Kilian personally contacted Joe Tolfa of Concours Motors, Inc. by telephone seeking assistance in having the vehicle lease terminated. (R. 39: 2; App. 102.) Further, on June 15, 2007, Mr. Kilian sent letters directed to Mercedes Financial, Mercedes, and their counsel, notifying them that Mr. Kilian was receiving daily telephone calls from Mercedes Financial and that the failure of Mercedes to payoff the lease violated the Wisconsin Lemon Law. (R. 38: 30-41.) On June 20, 2007, Mercedes Financial sent a letter in response advising that it would refrain from further contact with Mr. Kilian, and apologizing for the telephone calls Mr. Kilian received. (R. 38: 42.) On June 26, 2007, Mr. Kilian sent a second letter to Mercedes Financial, with a copy to its counsel, requesting that Mercedes Financial terminate the lease and provide Mr. Kilian with confirmation of same. (R. 38: 43-45.) Despite Mr. Kilian's requests, the lease was not terminated by Mercedes Financial or paid off by Mercedes.

Mr. Kilian subsequently received a Mercedes Financial "Federal Legal Notice" dated July 1, 2007, threatening to report negative information about his lease account to credit bureaus. (R. 39: 8; App. 108.) In fact, Mercedes Financial did report information to credit bureaus regarding Mr. Kilian's lease account. (R. 38: 29.) Mr. Kilian also received a payment notice from Mercedes Financial dated July 2, 2007, seeking payment of $5,478.36. (R. 39: 9; App. 109.) Mercedes Financial admitted sending the notices to Mr. Kilian. (R. 38: 16, 17.)

Mercedes Financial also admitted that it contacted Mr. Kilian seeking payment under the Motor Vehicle Lease Agreement subsequent to his return of the vehicle on May 10, 2007. (R. 38: 18, 27.) In addition, Mercedes Financial admitted that Mr. Kilian was not obligated to make any further lease payments nor was Mercedes Financial entitled to receive any further lease payments subsequent to May 10, 2007. (R. 38: 19.)

Mr. Kilian filed suit on July 10, 2007 when it became apparent that his efforts to resolve the situation without resorting to litigation were unsuccessful.

Mercedes finally refunded the current value of the written lease by sending a check in the sum of $95,252.37 to Mercedes Financial for the payoff of Mr. Kilian's lease on August 29, 2007. (R. 38: 21-23.)

STANDARD OF REVIEW

Summary judgment decisions are subject to de novo review, with the Court of Appeals applying the same methodology as the trial court. Kiss v. General Motors Corp., 2001 WI App 122, ¶ 9, 246 Wis. 2d 364, 630 N.W.2d 742 (Ct.App. 2001). Similarly, dismissal of a claim and the application of a statute to undisputed facts is reviewed de novo. Notz v. Everett Smith Group, Ltd., 2009 WI 30, ¶ 16, 764 N.W.2d 904, 909 (2009); DOR v. Menasha Corp., 2008 WI 88, ¶ 44, 311 Wis. 2d 579, 754 N.W.2d 95 (2008).

ARGUMENT

Summary of Argument

This case began with Mr. Kilian's request for a refund calculated in accordance with the Wisconsin Lemon Law. Mercedes determined that his vehicle qualified as a "lemon," accepted his request and agreed to provide a refund. Unfortunately, it did not end there. Although he returned his vehicle pursuant to the Wisconsin Lemon Law, Mr. Kilian was harassed with demands for payment by Mercedes Financial to make payments on its lease – due to the fact that Mercedes failed to issue a refund to Mercedes Financial and payoff the lease according to statute.

The Wisconsin Lemon Law was clearly not intended to expose a consumer to collection efforts by a lessor as occurred herein. To the contrary, the purpose of the law was to provide an incentive for manufacturers to put the purchaser of a "lemon" back to the position the purchaser was in at the time they bought the car and to do so in a timely manner. Hughes v. Chrysler Motors Corp., 197 Wis. 2d 973, 977, 542 N.W.2d 148, 149 (1996); Church v. Chrysler Corp., 221 Wis. 2d 460, 468, 585 N.W.2d 685, 688 (Ct.App. 1998); Dieter v. Chrysler Corp., 2000 WI 45, 234 Wis. 2d 670, 684, 610 N.W.2d 832, 838 (2000). The trial court's ruling that Mercedes complied with the Wisconsin Lemon Law by providing a partial refund to Mr. Kilian, leaving him with an outstanding lease obligation of over $95,000 and no vehicle, falls miserably short of restoring Mr. Kilian to the position he was in at the time he leased the vehicle.

The Wisconsin Legislature created important rights for consumers in enacting the Lemon Law, but the trial court's decisions have left Mr. Kilian **without a remedy**. Sec. 218.0171(2)(cm)3., Wis. Stats., provides that "**no person may enforce** the lease against the consumer after the consumer receives a refund." (Emphasis added). Either the Wisconsin Lemon Law requires Mercedes to pay off the lessor within the 30 day period – so that a lessor will not seek to collect on its lease, or Mr. Kilian must have a remedy against Mercedes Financial for causing him to incur expenses and other damages. Or, both remedies may exist.

Even without Mercedes Financial's collection defamation, a lease debt of $95,000 would prohibit most consumers from purchasing another vehicle until that debt was expunged. Further, to rule that Mr. Kilian has no claim against anyone, would mean that the defamation to Mr. Kilian's credit reports and harassment – as well as attorney fees incurred both before suit and in suit – would go uncompensated contrary to the purposes of the Lemon law.

This Court must decide whether Mr. Kilian should be permitted to pursue a claim against Mercedes, Mercedes Financial, or both.

I. RELEVANT APPELLATE AUTHORITY DEMONSTRATES THAT MR. KILIAN HAS A REMEDY AGAINST MERCEDES

The primary issues in this case have already been addressed by the Court of Appeals and can be resolved by applying existing case law. Significantly, the trial court did not follow the relevant appellate decisions and neither addressed nor distinguished this case in its decisions.

Mr. Kilian's claim against Mercedes for failure to provide the refund to both him and Mercedes Financial within the thirty day statutory period falls within the purview of Varda v. General Motors Corp., 2001 WI App 89, 242 Wis. 2d 756, 626 N.W.2d 346 (Ct.App. 2001). Varda addressed the obligations of a manufacturer under sec. 218.0171(2)(b)3.a., Wis. Stats. ("(2)(b)3.a."), where a consumer leased a "lemon" vehicle. The Court of Appeals eliminated any doubt of what a manufacturer must do to comply with the Wisconsin Lemon Law in Varda. The Varda Court explicitly described a manufacturer's obligations:

> The manufacturer's obligation when a consumer, as described in WIS. STAT. § 218.0171(1)(b)4, makes a demand are: acceptance of the return of the motor vehicle, refund to the lessor of the current value of the written lease, and refund to the consumer of the amount the consumer paid under the written lease plus any sales tax or collateral costs, less a reasonable use allowance. [Citation omitted.] **These are not presented as alternatives**, indicating that the legislature intended that **a manufacturer take all three steps** when a consumer as defined in subd. (1)(b)4 demands relief for a "lemon." Id., 242 Wis. 2d at 774, 626 N.W.2d at 356. (Emphasis added.)

The Varda Court plainly holds that a manufacturer must take "all three steps" of (2)(b)3.a. in order to comply with a consumer lessee's refund request. To complete "all three steps," the manufacturer **must** include a refund to the lessor, as described in Varda – regardless of a separate notice from the lessor.

Completing only two out of the three steps, as Mercedes did here, does not amount to compliance with the Wisconsin Lemon Law. Mercedes did not fulfill its statutory obligations in response to Mr. Kilian's refund request. Mercedes took back the vehicle from Mr. Kilian (STEP 1) and provided his portion of the refund

due (STEP 2), but failed to complete the transaction by neglecting to provide a timely refund to Mercedes Financial (STEP 3). (R. 39:1-2, 7; App. 101-102, 107.) By accepting Mercedes' argument, the trial court disregarded the directive of Varda that the requirements of (2)(b)3.a. are not presented as alternatives, and that all three requirements must be fulfilled by the manufacturer.

In addition, the recent Court of Appeals decision in Marquez v. Mercedes-Benz USA, LLC, 2008 WI App 70, 312 Wis. 2d 210, 751 N.W.2d 859 (Ct.App. 2008), is applicable to Mr. Kilian's claim against Mercedes. The Marquez Court found that the manufacturer (coincidentally Mercedes) was required to write two separate checks – one to the consumer and one to the bank – within the thirty day statutory period to comply with the refund requirement of the Wisconsin Lemon Law. Id., 312 Wis. 2d at 216, 751 N.W.2d at 862-863. Mercedes' obligation in this case is no different than in Marquez. In order to comply with the Lemon Law, Mercedes was required to provide the refund to Mr. Kilian and Mercedes Financial within thirty days of Mr. Kilian's request for a refund.

II. THE WISCONSIN LEMON LAW REQUIRES A MANUFACTURER TO PROVIDE A REFUND TO BOTH A LESSEE CONSUMER AND LESSOR WITHIN 30 DAYS OF THE CONSUMER'S OFFER TO RETURN A "LEMON" VEHICLE IN EXCHANGE FOR A REFUND

Throughout this litigation Mercedes disputed that Mr. Kilian could bring a claim for violation of the refund provision of (2)(b)3.a. because it did not pay the lessor. Ignoring Varda, Mercedes successfully argued that it was not required to provide a refund to Mercedes Financial in response to Mr. Kilian's request for a

refund and was only obligated to issue a refund to Mr. Kilian. The trial court failed to realize that – even without Mercedes Financial's collection efforts – a lease debt of $95,000 would prohibit most consumers from purchasing another vehicle until that debt was expunged.

In granting summary judgment to Mercedes, the trial court found no violation of the Wisconsin Lemon Law by Mercedes despite Mercedes failure to provide a refund to Mercedes Financial:

> Mercedes-Benz USA, given the circumstances, followed what was required of them and complied with 218.0171(2)(cm)1. The consumer offered to the manufacturer, returned the motor vehicle within 30 days after that offer, the manufacturer provided the refund to the consumer. So as a matter of law I'll find that Mr. Kilian does not have a violation of the so-called lemon law against Mercedes-Benz USA. (R. 93: 56; App. 165.)

The trial court noted that the Legislature made a distinction between consumers that purchase a vehicle and consumers that lease a vehicle. The trial court held that this distinction includes a requirement that a motor vehicle lessor must make its own request of the manufacturer in order to receive a refund.

A. A MANUFACTURER IS OBLIGATED TO PROVIDE A REFUND IN ACCORDANCE WITH SEC. 218.0171(2)(b)3.a., WIS. STATS.

The Wisconsin Lemon Law allows for consumers to obtain a refund where the consumer's vehicle has a nonconformity that has been subject to a reasonable attempt to repair. While the law sets forth different processes to obtain the refund depending upon whether the vehicle was purchased or leased by the consumer, the language of the refund provisions is nearly identical.

Subsection (2)(b) of the Wisconsin Lemon Law describes the obligations of manufacturers and provides a directive to manufacturers: "If after a reasonable attempt to repair the nonconformity is not repaired, the manufacturer ***shall*** carry out the requirement under subd. 2 or 3, whichever is appropriate." Sec. 218.0171(2)(b)1., Wis. Stats. (Emphasis added.) The provisions of subsection 2 apply to purchases and subsection 3 applies when the consumer leased the vehicle. Both subsections impose similar requirements upon manufacturers using parallel language:

LEASE	PURCHASE
"...accept return of the motor vehicle, refund to the motor vehicle lessor and to any holder of a perfected security interest in the motor vehicle, as their interests may appear, the current value of the written lease and refund to the consumer the amount the consumer paid under the written lease plus any sales tax and collateral costs, less a reasonable allowance for use." Sec. 218.0171(2)(b)3.a., Wis. Stats.	"Accept return of the motor vehicle and refund to the consumer and to any holder of a perfected security interest in the consumer's motor vehicle, as their interest may appear, the full purchase price plus any sales tax, finance charge, amount paid by the consumer at the point of sale and collateral costs, less a reasonable allowance for use." Sec. 218.0171(2)(b)2.b., Wis. Stats.

Regardless of whether the consumer purchased or leased the "lemon" vehicle, the manufacturer is required to accept return of the vehicle and provide a refund.

The law is clear in a lease situation that the manufacturer must take all three steps – including refunds to the lessor and the consumer – in order to comply with the Lemon Law. *See* Varda, 242 Wis. 2d at 774, 626 N.W.2d at 356. The requirement that the manufacturer provide a refund to both the consumer and

lessor under (2)(b)**3.a**. (within 30 days of a consumer's request) is consistent with how sec. 218.0171(2)(b)**2.b**., Wis. Stats. ("(2)(b)2.b."), is applied to a refund in a purchase situation. In a purchase situation, when a consumer returns a vehicle that was purchased, under subsection (2)(b)2.b. a manufacturer **must** provide a refund to both the consumer and the holder of any perfected security interest. Nick v. Toyota Motor Sales, U.S.A., Inc., 160 Wis. 2d 373, 383, 466 N.W.2d 215, 219 (Ct.App. 1991), *overruled on other grounds* by Hughes v. Chrysler Motors Corp., 197 Wis. 2d 973, 986, 542 N.W.2d 148, 152 (1996); Church v. Chrysler Corp., 221 Wis. 2d 460, 585 N.W.2d 685 (Ct.App. 1998). As set forth above, subsections (2)(b)2.b. and (2)(b)3.a. mirror one another. There is absolutely no basis to interpret them differently. While subsection (2)(b) outlines the requirements of manufacturers – i.e. this section tells the manufacturer what it must do – subsections 218.0171(2)(c) and (2)(cm), Wis. Stats. ("(2)(c) and (2)(cm)"), set forth the procedure for consumers (and lessors) to follow to obtain a refund – i.e. this section tells the consumer what he/she must do.

The trial court failed to distinguish AND SEPARATE the duties under (2)(b) for manufacturers versus the duties of consumers under (2)(c) and (2)(cm). If the trial court had applied the previous case law and followed the division of the statute, it would have recognized that the lessor must receive a refund within the 30 day time limit. (We note that the requirement is 30 days, but herein, Mercedes failed to refund the current value of the lease for over 100 days.)

As to the consumer's duties under (2)(c) and (2)(cm), although the statutory sections differ regarding whether the consumer purchased or leased a vehicle, both sections contain strikingly similar language regarding the consumer's process of seeking a refund. Subsection (2)(cm) sets forth the procedure to obtain a refund where the consumer leased the "lemon" vehicle. Subsection (2)(cm) is further divided into subsections 1 and 2, which allow either a consumer or a lessor to seek a refund due under (2)(b)3.a.

Although (2)(cm)1. describes how a consumer **initiates** the refund process and (2)(cm)2. describes the procedure when a lessor **initiates** a refund, both subsections seek the same two refunds described in (2)(b)3.a. and impose a 30 day time requirement for the manufacturer to comply. Sec. 218.0171(2)(cm)1. and 2., Wis. Stats. Subsection (2)(c) applies to a consumer who purchased a vehicle, providing that the consumer MUST offer to transfer title of the consumer's vehicle to the manufacturer, and that the manufacturer must provide a refund no later than 30 days after such offer. Sec. 218.0171(2)(c), Wis. Stats.

The Court of Appeals recently interpreted the refund provision of (2)(c) (for purchasers) to require that the manufacturer provide two refund checks – one to the consumer and one to the bank with a security interest in the vehicle. In Marquez v. Mercedes-Benz USA, LLC, 2008 WI App 70, 312 Wis. 2d 210, 751 N.W.2d 859 (Ct.App. 2008), the consumer sought a refund for a vehicle that he purchased which had an outstanding loan. The Marquez Court noted that the Wisconsin Lemon Law requires the manufacturer to provide a refund to the

consumer and to any holder of a perfected security interest: "In our view, the plain and ordinary meaning of the phrase 'refund to...any holder of a perfected security interest...as [its] interest may appear' involves the payor transferring the correct sum to the secured lender..." Id., 312 Wis. 2d at 216, 751 N.W.2d at 862-863. The Court found that in order to comply with the Lemon Law, the manufacturer was required to write two checks: one to the consumer and **a separate check to the bank** paying off its interest in the car – both within the 30 day time frame. Id.

It is important to note that the Marquez Court found that the manufacturer had to issue two checks in response to the consumer's refund request under (2)(c), even though subsection (2)(c) makes no reference to the "holder of a perfected security interest in the consumer's motor vehicle" or a SEPARATE refund due to the holder of a security interest. Rather, (2)(c), describes how a consumer may seek a refund and when the manufacturer must provide the consumer with the refund.

Similarly, (2)(cm)1. only refers to the consumer and does not specifically mention the lessor's separate refund. Yet, the trial court ignored the fact and interpreted (2)(cm)1. differently than the Court of Appeals interpreted (2)(c), finding that (2)(cm)1. only triggered the duty of Mercedes to provide a refund to Mr. Kilian.

B. A CONSUMER WHOSE LEASE REMAINS UNPAID WOULD EFECTIVELY BE PRECLUDED FROM SECURING FINANCING FOR A REPLACEMENT VEHICLE

The trial court's determination that a consumer/lessee's refund request under (2)(cm)1. only entitles the consumer/lessee to receive his portion of the refund pursuant to (2)(b)3.a. fails to follow the plain language of the statute and cases interpreting those sections. Requiring consumer/lessees and lessors to make independent refund requests under (2)(cm)1. and 2. presents a number of practical problems as well.

If the manufacturer is not required to provide the lessor with a refund within 30 days of the consumer/lessee's request for a refund, there is no time limit as to when the lessor's refund is due. The consumer/lessee would have to wait for the lessor to seek its refund, if the lessor chose to make such a request, before the consumer's lease would be paid off. Since the Wisconsin Lemon Law does not mandate that the vehicle lease is terminated or canceled upon payment of the consumer/lessee's refund, **the unpaid lease obligation could remain indefinitely on the consumer/lessee's credit report—as happened herein**. Even if the lease cannot be enforced against the consumer/lessee, the outstanding lease obligation is still ON THE CONSUMER'S CREDIT RATING until paid. This would preclude a typical consumer from securing financing on a new REPLACEMENT vehicle for the "lemon," even though the consumer/lessee has fulfilled his or her obligations under the Wisconsin Lemon Law.

Credit reports include information such as bill-paying history, the number and type of accounts, late payments, and outstanding debt. Such information impacts a consumer/lessee's credit score, and the ability to obtain credit. *See* Federal Trade Commission Bureau of Consumer Protection Division of Consumer and Business Education, Building a Better Credit Report, March, 2008, at 5; (App. 230); and *Your Credit Score Helps Determine What You'll Pay For Credit And Insurance*, at http://ftc.gov/bcp/menus/consumer/credit/reports.shtm; (App. 220.)

Moreover, if (2)(cm)1. and 2. require both a consumer/lessee and a lessor to make independent refund requests, the provisions of (2)(b)3.a., is rendered superfluous. There would be no purpose served by subsection (2)(b)3.a. as the duties of the consumer/lessee, lessor and manufacturer would be dictated by (2)(cm)1. and 2. Such an interpretation is erroneous. "A statute should be construed so that no word or clause shall be rendered superfluous and every word if possible should be given effect." State v. Martin, 162 Wis. 2d 883, 894, 470 N.W.2d 900, 904 (1991), *quoting* Donaldson v. State, 93 Wis. 2d 306, 315, 286 N.W.2d 817 (1980).

Further, the Wisconsin Supreme Court has noted that a literalistic interpretation of the Lemon Law should not be given effect where it would not be consistent with the statute's remedial purpose. Garcia v. Mazda Motor of America, Inc., 2004 WI 93, 273 Wis. 2d 612, 623, 682 N.W.2d 365, 370 (2004). Construing the Wisconsin Lemon Law in a manner that would leave a consumer/lessee with a piecemeal remedy – and likely unable to finance a

replacement vehicle – is erroneous. This case illustrates the problems that can arise under a flawed interpretation. Even without any collection efforts, the parties would remain in the position they were in before the lawsuit was filed; i.e., Mr. Kilian would have an outstanding lease obligation of over $95,000, **but no vehicle**.

Manufacturers have an interest in having FULL PAYMENT (2 checks) payable from one notice. They would also be left in an awkward position if consumer/lessees and lessors had to make separate demands under the Wisconsin Lemon Law. The manufacturer would have possession of the vehicle, but would not have title unless or until the lessor sought a refund in accordance with (2)(cm)2. The manufacturer would not be able to take any action with regard to the vehicle as the lessor would still be the owner of the vehicle even though the manufacturer properly took possession of the vehicle pursuant to (2)(b)3.a.

Mercedes would have a vehicle **but no title,** while Mercedes Financial would have a title but no vehicle. If Mercedes Financial opted not to seek a refund in accordance with (2)(cm)2., the parties would remain in this limbo indefinitely. This scenario would not fulfill the Lemon Law's purpose of restoring Mr. Kilian to the position he was in at the time he leased the vehicle – no lemon, no debt, no lease obligation, and no "blur" on his credit rating.

C. THERE ARE LOGICAL REASONS FOR THE LEGISLATURE TO PROVIDE ALTERNATE MEANS OF INITIATING THE REFUND PROCESS IN A LEASE SITUATION

The only logical reading of (2)(cm)1. and 2. is that they are alternative means of obtaining the refund described in (2)(b)3.a. Such an interpretation not only gives effect to (2)(b)3.a., but is consistent with how a refund must be provided in a purchase situation as well.

The Wisconsin Lemon Law allows either a consumer/lessee, pursuant to (2)(cm)1., or a lessor, pursuant to (2)(cm)2., to make a request for a refund that triggers the manufacturer's obligation to provide a refund under (2)(b)3.a. Given the unique circumstances in a lease situation, where a consumer/lessee has physical possession of a vehicle but the lessor holds title, it was necessary for the Legislature to provide both consumer/lessees and lessors a method of seeking Lemon Law relief.

Consumer/lessees must be able to seek a refund under the Lemon Law as they are the ones driving the vehicle, charged with the responsibility of reporting a nonconformity and making the vehicle available for repair. Accordingly, consumer/lessees are knowledgeable of the problems that qualify a vehicle for Lemon Law relief and are well situated to seek such relief.

However, circumstances may arise where consumer/lessees do not initiate the refund process while in possession of a vehicle. For example, a consumer/lessee could choose to terminate a lease early due to problems with the

vehicle, turn in the vehicle at the end of the lease, or simply not want to bother with a Lemon Law claim at all. Lessors have a right to be made whole and should not be stuck with a "lemon" vehicle. Nor should a lessor be put in the position of selling a defective vehicle and putting it into the stream of commerce without proper notice, disclosure or repair. Subsection (2)(cm)2. allows lessors to seek a refund from the manufacturer to avoid such an outcome.

In addition, under sec. 218.0171(2)(a), Wis. Stats., a consumer/lessee may report a nonconformity to the motor vehicle lessor. If a consumer/lessee notifies the lessor that a leased vehicle has a nonconformity, the lessor would be in a position to make a request for a refund pursuant to (2)(cm)2. independent of the consumer.

Without (2)(cm)2., lessors could be left with "lemon" vehicles with no recourse. Subsection (2)(cm)2 is clearly not a mandate that lessors make a refund request independent of consumer/lessees, nor is it a condition precedent to a lessor receiving a refund under the Wisconsin Lemon Law. Subsections (2)(cm)1. and 2. provide alternative methods of obtaining a refund to ensure that all parties are afforded the remedies of the Wisconsin Lemon Law.

D. IT IS MANDATORY THAT A LESSOR TRANSFER TITLE OF A LEMON UNDER THE WISCONSIN LEMON LAW IN ORDER TO REMOVE THE CLEAN TITLE FROM THE STREAM OF COMMERCE

Based upon the trial court's ruling, a lessor would not be required to transfer title of a "lemon" vehicle to the manufacturer. Mercedes and Mercedes

Financial successfully argued that a lessor has the option of seeking Lemon Law relief or simply retaining the vehicle. However, this presents a number of practical problems as outlined above. More importantly, it would leave the "lemon" vehicle in the stream of commerce with a title that has not been branded.

The title of a vehicle that has been returned by a consumer/lessee under the Wisconsin Lemon Law must reflect that it is a manufacturer's buyback, and full disclosure of the buyback must be made to prospective purchasers. The Wisconsin Lemon Law provides that: "No motor vehicle returned by a consumer or motor vehicle lessor in this state under par. (b), or by a consumer or motor vehicle lessor in another state under a similar law of that state, may be sold or leased again in this state unless full disclosure of the reasons for return is made to any prospective buyer or lessee." Sec. 218.0171(2)(d), Wis. Stats. Further, if a vehicle was a manufacturer buyback, it must be permanently recorded on the certificate of title. Sec. 342.10(3)(e), Wis. Stats. A manufacturer's buyback vehicle is a vehicle that was "repurchased by its manufacturer, or by an authorized distributor or dealer with compensation from the manufacturer, because of a nonconformity that was not corrected after a reasonable attempt to repair the nonconformity under s. 218.0171 or under a similar law of another state." Sec. 340.01(28e), Wis. Stats. Despite the clear statutory provisions, the Odometer Disclosure statement presented to Mr. Kilian when he returned his vehicle to Mercedes did not indicate that the vehicle is a "Manufacturer Buyback." (R. 46: 14.)

A vehicle that has been returned by a lessee consumer in exchange for a refund under the Wisconsin Lemon Law clearly falls within the definition of a "manufacturer's buyback vehicle." The trial court's decision and the position advanced by Mercedes and Mercedes Financial creates a major loophole that prevents disclosure to a prospective buyer, and avoids branding the title.

Moreover, allowing a lessor to simply retain a problematic vehicle that has been returned by a consumer/lessee thwarts the purpose of the Lemon Law. In Varda, the Court of Appeals stressed the importance of returning the "lemon" vehicle to the manufacturer. The Court noted that returning the vehicle is not an option that the lessee consumer may or may not exercise. "The provisions in subd. (2)(b)2 setting forth the two alternative forms of relief available to all other categories of consumers also contemplate that the consumer will return the vehicle. This is logical because, in all cases, the vehicle has a nonconformity that has not been repaired after reasonable attempts at repair." Id., 242 Wis. 2d at 775, 626 N.W.2d at 356. The Varda Court also recognized that the legislature provided uniformity of return of the vehicle as a feature of every category of relief. Id.

Under the terms of the Lemon Law, when a consumer/lessee returns a vehicle to the manufacturer, the manufacturer takes possession of the vehicle. In order to accomplish this, it is mandatory for the lessor to transfer title of the vehicle. However, under the trial court's decision, a lessor has the option of EITHER seeking a refund from the manufacturer or keeping the vehicle – so that the lessor would not be required to transfer title. If a lessor is not required to

transfer title to the manufacturer, what happens next? Will the certificate of title be branded? What disclosure will be made to prospective buyers? How would a conflict between the manufacturer and lessor be resolved? As in the purchase situation, the statute is not intended to make return of a vehicle by the lessor optional. Return of the vehicle is mandatory.

It is apparent from the provisions of the Wisconsin Lemon Law that motor vehicle lessors are bound by the terms of the statute. The Legislature recognized that lessors are considered part of the automobile industry and included lessors among the same provisions as manufacturers and motor vehicle dealers. For example, lessors are referenced in the repair attempt requirements of the statute: "The same nonconformity with the warranty is subject to repair by the manufacturer, motor vehicle lessor or any of the manufacturer's authorized dealers..." Sec. 218.0171(1)(h)1., Wis. Stats. Similarly, sec. 218.0171(2)(a), Wis. Stats., states that: "If a new motor vehicle does not conform to an applicable express warranty and the consumer reports the nonconformity to the manufacturer, the motor vehicle lessor or any of the manufacturer's authorized motor vehicle dealers..." Sec. 218.0171(2)(a), Wis. Stats.

This case demonstrates the close connection between motor vehicle manufacturers and lessors as Mercedes Financial is the "financial arm" of Mercedes. (R. 46:12.) Motor vehicle lessors must not be permitted to circumvent the Lemon Law as the Legislature explicitly incorporated them into the terms of the statute.

III. A CONSUMER IS ENTITLED TO SEEK EQUITABLE RELIEF UNDER SEC. 218.0171(7), WIS. STATS., FOR A VIOLATION OF SEC. 218.0171(2)(cm)3., WIS. STATS.

In assessing Mr. Kilian's claim for relief, the trial court placed undue emphasis on pecuniary loss and monetary damages. The trial court determined that "the most important issue is the issue concerning the pecuniary loss." (R. 94: 29; App. 203.)

The trial court rejected Mr. Kilian's claim for equitable relief, finding that it wasn't necessary for Mr. Kilian to commence a lawsuit:

> In this case we have a lease arrangement. We have erroneous demands for payment of the lease amounts. We have absolutely no payment of the lease. And, understandably, there may have been attorney's fees associated with responding to that, but I don't find that it was necessary. I don't find that it was mandatory. I don't find it was any – that there is any requirement that a lawsuit be – I can't buy that, that a lawsuit had to be brought. It was clear that an error was made. That's clear from the affidavits and the submissions. (R. 94: 33; App. 207.)

The trial court neglected to consider **the position Mr. Kilian was in prior to commencement of this action**. Not only was the lease still on Mr. Kilian's credit reports, but Mr. Kilian WAS FORCED to stop Mercedes Financial's collection efforts – all to no avail. At the time Mr. Kilian filed the lawsuit, he was seeking equitable relief from the trial court to force a cessation of any further collection action by Mercedes Financial, as well as to get Mercedes to provide the refund to Mercedes Financial and payoff the lease. And, this was not just a hypothetical fear of collection efforts – although the lease still being on his credit

reports would be real enough. Here, Mercedes Financial harassed and defamed Mr. Kilian in its attempts to collect on its lease!

Mr. Kilian filed the lawsuit on July 10, 2007, **but it took until August 29, 2007 for Mercedes to issue a refund to Mercedes Financial**. (R. 1; R. 38: 21-23.) Mr. Kilian appropriately sought equitable relief from the trial court due to Mercedes Financial's violation of sec. 218.0171(2)(cm)3., Wis. Stats., which provides that "**no person may enforce** the lease against the consumer after the consumer receives a refund." (Emphasis added.) Either the Wisconsin Lemon Law requires Mercedes to pay off the lessor within the 30 day period so that a lessor will not seek to collect on its lease, or Mr. Kilian must have a remedy against Mercedes Financial for causing him to incur expenses and other damages. Or, both remedies may exist.

Notwithstanding this provision, it is undisputed that representatives of Mercedes Financial contacted Mr. Kilian demanding payment under his Motor Vehicle Lease Agreement after he returned the vehicle to Mercedes. (R. 24: 12; R. 39:2; App. 102.) At first, after being notified that its contact with Mr. Kilian was contrary to the Wisconsin Lemon Law, Mercedes Financial apologized for its calls to Mr. Kilian and promised that it would refrain from further contact with Mr. Kilian. (R. 38: 30-31, 42.) Despite its promises, Mercedes Financial continued to seek payment from Mr. Kilian, and threatened to report negative information about his lease account. (R. 39: 8-9; App. 108-109.) Ultimately, Mercedes Financial followed through on its threat by reporting information to

credit bureaus regarding Mr. Kilian's failure to pay on its lease account. (R. 38: 29.)

Just because Mercedes and Mercedes Financial eventually complied with the Wisconsin Lemon Law does not mean that Mr. Kilian cannot proceed with his lawsuit, or that he did not suffer damages due to a violation of the statutory provisions. Even after Mercedes finally provided a refund to Mercedes Financial, Mr. Kilian was still entitled to an equitable remedy requiring Mercedes Financial to remove its false report and wipe Mr. Kilian's credit history clean.

The provisions of the Wisconsin Lemon Law plainly state that a consumer/lessee is entitled to equitable relief: "In addition to pursuing any other remedy, a consumer may bring an action to recover for any damages caused by a violation of this section. The court shall award a consumer who prevails in such an action twice the amount of any pecuniary loss, together with costs, disbursements and reasonable attorney fees, and ***any equitable relief*** the court determines appropriate." Sec. 218.0171(7), Wis. Stats. (Emphasis added.)

The remedies provided in sec. 218.0171(7), Wis. Stats., mirror those found in another provision of Chapter 218 in sec. 218.0172(4), Wis. Stats. In fact, the language of sec. 218.0171(7), Wis. Stats. and sec. 218.0172(4), Wis. Stats. is nearly identical. Section 218.0172(4), Wis. Stats. states: "Remedies. In addition to pursuing any other remedy, a consumer may bring an action to recover damages caused by a violation of this section. A court shall award a consumer who prevails in such an action twice the amount of any pecuniary loss, together with costs,

disbursements and reasonable attorney fees, notwithstanding s. 814.04(1), and any equitable relief the court determines appropriate."

While sec. 218.0171(7), Wis. Stats., has not yet been analyzed or interpreted by Wisconsin's appellate courts, sec. 218.0172(4), Wis. Stats., has. In Cuellar v. Ford Motor Co., 2006 WI App 210, 296 Wis. 2d 545, 723 N.W.2d 747 (Ct.App. 2006), the Court of Appeals determined that sec. 218.0172(4), Wis. Stats., did not require consumers to establish pecuniary loss to maintain an action. The Cuellar Court found that the trial court erred in granting summary judgment: "Moreover, the trial court further supported its decision to grant judgment to Ford based on the failure of Cuellar to demonstrate a pecuniary loss. Again, the trial court was mistaken in its belief that the statute requires a showing that pecuniary loss be incurred in order to maintain a claim." Id., 296 Wis. 2d at 561-562, 723 N.W.2d at 755.

The Cuellar Court also noted that: "The plain language of the statute does not require, in all instances, a pecuniary loss. Accordingly, the trial court's determination that Cuellar did not have standing because he did not suffer any pecuniary loss was erroneous." Id., n. 11. The Court of Appeals reversed the summary judgment and remanded the case for further proceedings on the consumers' damages. "The proper remedy in this case is not for this court to decide. Whether the class has suffered any pecuniary loss, ...or whether any other equitable relief is appropriate all present issues of fact, which need to be decided

by a fact-finder after discovery has been completed." Id., 296 Wis. 2d at 562, 723 N.W.2d at 755.

Just as the consumer in Cuellar, Mr. Kilian was not required to suffer a pecuniary loss in order to maintain a cause of action for violation of the Wisconsin Lemon Law. Seeking an equitable remedy from the court is a sufficient basis to commence and continue an action for violation of any section of the Wisconsin Lemon Law pursuant to sec. 218.0171(7), Wis. Stats.

Mr. Kilian had sufficient grounds to commence an action to cease Mercedes Financial's collection efforts against him. Mr. Kilian was entitled to continue his action to seek equitable relief requiring Mercedes Financial to rectify the situation with his credit report. The trial court erred in dismissing Mr. Kilian's claim against Mercedes Financial because he had no pecuniary loss.

IV. ATTORNEY FEES AND COSTS INCURRED PRIOR TO LITIGATION DUE TO A VIOLATION OF SEC. 218.0171(2)(cm)3., WIS. STATS. QUALIFY AS A PECUNIARY LOSS UNDER SEC. 218.0171(7), WIS. STATS.

Even though a consumer is not required to have suffered a pecuniary loss in order to maintain an action under sec. 218.0171(7), Wis. Stats., Mr. Kilian did incur pecuniary losses for which he sought relief. Among the pecuniary losses alleged by Mr. Kilian were his attorney fees and costs incurred prior to the filing of the lawsuit due to the collection efforts of Mercedes Financial. (R. 68.)

The trial court agreed with Mercedes Financial that attorney fees are not a pecuniary loss as a matter of law. (R. 94: 17, 33-34; App. 126, 142-143.) While

the trial court recognized that Mr. Kilian incurred pre-suit attorney fees associated with Mercedes Financial's demands for payment of the lease, it did not find that the fees qualified as a pecuniary loss: "And, understandably, there may have been attorney's fees associated with responding to that, but I don't find that it was necessary. I don't find it was mandatory." (R. 94: 33; App. 142.) The trial court concluded that Mr. Kilian had no pecuniary loss. (R. 94: 33-34; App. 142-143.) In other words, "so sad, but too bad!"

The Wisconsin Lemon Law allows a consumer to recover his or her pecuniary loss but the statute does not define pecuniary loss. Sec. 218.0171(7), Wis. Stats. However, in Hughes v. Chrysler Motors Corp., 188 Wis. 2d 1, 523 N.W.2d 197 (Ct.App. 1994), the Court of Appeals determined that attorney fees incurred prior to commencing a lawsuit were recoverable under the Wisconsin Lemon Law. The Hughes Court held that an award of fees for time spent on a case prior to when a violation of the lemon law action accrued was proper. Id., 188 Wis. 2d at 18, 523 N.W.2d at 204.

Mr. Kilian's pre-suit attorney fees that were incurred as a direct result of a violation of sec. 218.0171(2)(cm)3., Wis. Stats., are part of a consumer's pecuniary loss and an appropriate item of damages under the Wisconsin Lemon Law. Should a consumer incur a loss due to a lessor's improper collection attempts? The undisputed facts in this case establish that Mercedes Financial was demanding payment from Mr. Kilian under the Motor Vehicle Lease Agreement after he returned the vehicle and received his refund. It is also undisputed that Mr.

Kilian was unable to halt Mercedes Financial's collection attempts without retaining an attorney. (R. 39; App. 101-109.) Since Mr. Kilian could not stop Mercedes Financial, he was forced to hire counsel to address the situation. Numerous letters were sent to Mercedes Financial, Mercedes and their counsel in an attempt to resolve the matter short of litigation. (R. 38: 30-41, 43-45.) Mr. Kilian must be able to recover the expense of his attorney fees prior to filing a lawsuit as part of his damages as the fees were incurred as a direct result of Mercedes Financial's actions in attempting to collect on its lease.

The trial court disregarded Mr. Kilian's unsuccessful efforts to resolve this matter prior to litigation, as well as the refusal of Mercedes Financial to cease its improper attempts to collect from Mr. Kilian. The trial court erroneously dismissed Mr. Kilian's claim against Mercedes Financial for lack of a pecuniary loss by refusing to consider his pre-suit attorney fees as a part of his damages.

V. DEFAMATION DAMAGES ARE A PECUNIARY LOSS UNDER SEC. 218.0171(7), WIS. STATS. WHERE THE MOTOR VEHICLE LESSOR EMPLOYS ECOMNOMIC DEFAMATION IN ITS ATTEMPT TO ENFORCE A LEASE IN VIOLATION OF SEC. 218.0171(2)(cm)3., WIS. STATS.

The Wisconsin Lemon Law permits a consumer to bring an action to recover for any damages caused by a violation of the statute. Sec. 218.0171(7), Wis. Stats. Accordingly, a consumer's defamation damages resulting from a lessor's violation of sec. 218.0171(2)(cm)3., Wis. Stats., by enforcing a lease against the consumer after receiving a refund are recoverable.

The trial court acknowledged that Mercedes Financial may have **made an erroneous report regarding Mr. Kilian's lease account**. However, the trial court did not find that Mr. Kilian was entitled to damages associated with the false report. "And I believe that probably, maybe there was a report to a credit agency, but I don't have anything stating that with certainty, and I have absolutely no information whatsoever that any defamatory action or result occurred, and so that claim as it pertains to defamation is not supported on the record." (R. 94: 32; App. 206.)

Contrary to the trial court's statements, the evidence in the record regarding information being reported to credit reporting agencies was from Mercedes Financial's own representative. Mr. Glen Bieler appeared for deposition on behalf of Mercedes Financial. (R. 24: 5.) Mr. Bieler testified that Mercedes Financial reported information to credit bureaus regarding Mr. Kilian's **overdue** lease account. (R. 24: 17.) There is absolutely no evidence in the record to contradict Mr. Bieler's testimony. The trial court had no basis to disregard Mr. Bieler's sworn statements.

The record is also clear that Mercedes Financial's collection efforts included calls to Mr. Kilian demanding payment under the lease which escalated to written notices threatening to report negative information to credit bureaus. (R. 39: 2, 8-9; App. 102, 108-109; R. 40: 26.) Mercedes Financial also admitted to seeking payment from Mr. Kilian subsequent to his return of the vehicle to Mercedes even though he was not obligated to make any further lease payments

by statute, and it was not entitled to receive any further payments. (R. 38: 18-19, 27.) *See* sec. 218.0171(2)(cm)3., Wis. Stats.

Mr. Kilian is entitled to recover for damage to his financial reputation that resulted from Mercedes Financial's erroneous reports to credit bureaus regarding his lease account. Mr. Kilian was not required to prove special damages or submit any specific proof of such damages. "When defamatory matter is communicated in the form of libel, the person defamed has the benefit of a **conclusive presumption of the existence of general damages** (i.e., humiliation, injury to feelings, damages to reputation or good name), and such presumption supports a monetary award for such damages even without any affirmative proof on the subject at the time of trial." Russell M. Ware, et al., *The Law of Damages in Wisconsin*, Sec. 11.30, p. 21, 3d. ed. (2000)(emphasis added).

The same rule holds true for mere slander if such slander involves the "...business, trade, profession or office, and unchastity of a woman." Martin v. Outboard Marine Corp., 5 Wis. 2d 452, 459, 113 N.W.2d 135, 139 (1962). Stated another way, Mercedes Financial's defamatory conduct is defamatory *per se*- requiring no proof of special damages and a jury may award general damages even without affirmative proof of actual harm. Instead of dismissing Mr. Kilian's claim for defamation damages, the trial court should have allowed this case to proceed to the jury for a determination of damages.

VI. DAMAGES FOR INCONVENIENCE RESULTING FROM A MOTOR VEHICLE LESSORS ECONOMIC DEFAMATION IN ITS ATTEMPT TO ENFORCE A LEASE ARE A PECUNIARY LOSS UNDER SEC. 218.0171(7), WIS. STATS.

Damages for inconvenience resulting from a lessor's violation of sec. 218.0171(2)(cm)3., Wis. Stats., may also be recovered under sec. 218.0171(7), Wis. Stats. However, the trial court did not even address Mr. Kilian's claim for inconvenience damages when it dismissed his claim against Mercedes Financial. (R. 94; App. 175-216.)

The Wisconsin Supreme Court has determined that inconvenience is an appropriate and proper element of damages. Piorkowski v. Liberty Mutual Ins. Co., 68 Wis. 2d 455, 463, 228 N.W.2d 695, 700 (1975). The inconvenience and annoyance occasioned directly by the wrongful act of the defendant is a legitimate item in estimating damages. Id. *See also* White v. Benkowski, 37 Wis. 2d 285, 289, 155 N.W.2d 74, 76 (1967) (plaintiffs may recover damages for inconvenience and are not required to ascertain damages with mathematical precision.)

There was evidence in the record that established that the conduct of Mercedes Financial caused great inconvenience to Mr. Kilian in his efforts to stop its collection attempts. Mr. Kilian and his family were significantly inconvenienced by the telephone calls they received from representatives of Mercedes Financial seeking payment, which included daily telephone calls for a period of time. (R. 39: 2; App. 102; R. 80: 19.) Mr. Kilian had to repeatedly explain that he returned the vehicle to Mercedes and was not responsible for

payment of the lease. (R. 39: 2; App. 102; R. 40: 26.) When his efforts proved unsuccessful, Mr. Kilian involved the local dealership seeking assistance. (R. 39: 2; App. 102.)

Mr. Kilian is entitled to seek an award of damages for the inconvenience he experienced as a result of Mercedes Finanical's conduct. The trial court's dismissal of Mr. Kilian's claim for lack of damages without allowing Mr. Kilian to submit his claim to a jury was unfounded.

CONCLUSION

Mr. Kilian requested a refund from Mercedes calculated in accordance with the Wisconsin Lemon Law. Mercedes agreed to provide such refund. Mr. Kilian returned the leased vehicle and received *his* portion of the refund as required under (2)(b)3.a. in a timely manner. However, Mercedes did not issue the refund to the lessor, Mercedes Financial, as required under (2)(b)3.a. in a timely manner. It was not until Mr. Kilian hired an attorney and filed suit that Mercedes Financial stopped its enforcement efforts. It took over 100 days past the 30 day statutory time limit for Mercedes to finally pay off the lease.

The trial court ruled that Mercedes complied with the Lemon Law by providing only the partial refund to Mr. Kilian, leaving him with an outstanding lease obligation of $95,000 and no vehicle. In so doing, the trial court disregarded the plain meaning of the statute as well as the Court of Appeals holding in Varda. The Varda Court sets out three steps that a manufacturer **must** take in order to comply with a consumer/lessee's Lemon Law refund request: 1. accept return of

the motor vehicle; 2. refund the current value of the written lease to the lessor; and 3. refund to the consumer the amount the consumer paid under the written lease.

In this case, Mercedes completed only two of the three steps. It accepted return of the vehicle and refunded Mr. Kilian the amount he paid under the written lease. Mercedes did not refund the lessor the current value of the written lease in a timely manner. As a result, Mercedes violated the Wisconsin Lemon Law entitling Mr. Kilian to the statutory damages for such violation.

In addition, Mercedes Financial also violated the Wisconsin Lemon Law by demanding lease payments from Mr. Kilian after Mercedes had accepted return of the vehicle, harassing him and his family with continuous collection phone calls, sending threatening written collection notices and slandering Mr. Kilian's credit by reporting him to credit reporting agencies.

The Wisconsin Lemon Law was not intended to expose a consumer to collection efforts by a lessor as occurred herein. Section (2)(cm)3. provides that "no person may enforce the lease against a consumer after the consumer receives a refund." Yet, that is precisely what Mercedes Financial did in this case. And because of Mercedes Financial's collection efforts and Mercedes' failure to pay off the lease in a timely manner, Mr. Kilian was forced to file a lawsuit. The trial court disregarded the plain meaning of the Lemon Law, both in the strict prohibition against enforcement of the lease, as well as the consumer's right to seek damages *and* equitable relief.

In its ruling, the trial court overlooks the purpose of the Lemon Law in putting purchasers of "lemons" back in the position they were in at the time of purchase or lease. In summarily dismissing Mr. Kilian's claims, the trial court condones Mr. Kilian being left with no car, a $95,000 lease debt, slanderous communications to credit bureaus, no right to file a lawsuit AND a judgment against him for costs. Clearly this holding cannot be in accord with Wisconsin's strong remedial consumer protection Lemon Law statute.

Mr. Kilian respectfully requests that the Court reverse the judgment of the trial court and remand this case with instructions to the trial court to enter judgment in Mr. Kilian's favor against Mercedes, and for a trial on the damages to be awarded to Mr. Kilian for Mercedes Financial's violation of the Lemon Law.

Dated this 23rd day of June, 2009.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 38 pages. It contains 8,833 words.

Signed: _____

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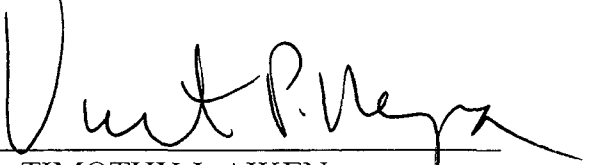
APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Signed: 

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